

Founded in 1852
by Sidney Davy Miller

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October 23, 2015

VIA HAND DELIVERY

Honorable Ruth Johnson
Michigan Secretary of State
Treasury Building - 1st Floor
430 West Allegan Street
Lansing, MI 48918

Via E-mail to: elections@michigan.gov

Re: Declaratory Ruling Request Regarding Authorized Expenses Under Section 55 of
the Michigan Campaign Finance Act

Dear Secretary Johnson:

We represent a Michigan for-profit corporation that solicits contributions to a separate segregated fund ("SSF") from persons or their spouses as authorized under Section 55(2) of the Michigan Campaign Finance Act, P.A. 388 of 1976, as amended, MCL 169.201, et seq. ("MCFA"). On behalf of this for-profit corporation, and pursuant to Section 15(1)(e) and (2) of the MCFA and Rule 169.6 of the Michigan Administrative Code, we request a declaratory ruling as to the applicability of the MCFA to an actual statement of facts. MCL 169.215(2) of the MCFA mandates that if the Michigan Department of State ("Department") does not issue a declaratory ruling, the Department must issue an interpretive statement providing an informational response to the questions presented within the same time limitation applicable to a declaratory ruling.

The purpose of this request is to obtain the Department's position as to whether the United States Supreme Court ruling in *Citizens United v. FEC*, 558 U.S. 310; 130 S.Ct. 876 (2010) as applied to the MCFA by the United States District Court for the Western District of Michigan in *Michigan Chamber of Commerce v. Land*, 725 F.Supp.2d 665 (W.D. Mich. 2010) abrogates or modifies the Department's interpretive statements of November 29, 1984 (Whitefield) and October 4, 1984 (Schick) ("the Interpretive Statements"), regarding using corporate funds to pay for certain administrative and fundraising costs associated with a SSF established under Section 55 of the MCFA. The Interpretive Statements also contradict an October 26, 1983 Declaratory Ruling (Barrett) issued by the Department and requires clarification.

Statement of Facts

1. The corporation, organized on a for-profit basis, has established a SSF pursuant to Section 55 of the MCFA.
2. As authorized by Section 55(2) of the MCFA, the corporation solicits contributions for the SSF throughout the year from the following persons or their spouses: (a) stockholders; (b) officers and directors; and (c) employees who have policy making, managerial, professional, supervisory, or administrative non-clerical responsibilities.
3. As required by Section 55(6) of the MCFA, the corporation does not obtain contributions for the SSF by use of coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. All contributions to the SSF are completely voluntary or optional.
4. In administration of the SSF, the corporation incurs and pays for various expenses of the SSF including the cost of phones, salaries, supplies, legal and accounting fees, computer equipment, and other associated expenses.
5. To increase levels of giving to the SSF, the corporation intends to institute two new programs:
 - (a) Establish "contributor club levels" which will provide additional non-monetary incentives to contributors who reach certain giving levels. For example, an individual who chooses to contribute at the highest level will be invited to attend a dinner with the Chair of the Board of Directors or the CEO of the Company. Another example would be to be invited to participate in a round of golf with members of the Board of Directors. Participation at any given level and attendance at any invitational event will be completely voluntary in compliance with Section 55(6) of the MCFA.
 - (b) Host cocktail receptions at the corporation's facilities where food and beverages will be served at no cost to the attendees, which will include contributors to the SSF permitted under Section 55(2). The corporation expects that certain guest speakers will be invited to these receptions and that the guest speakers may include elected officials or candidates running for public office at the local, state, or federal level.
6. The SSF makes contributions from its fundraising activities to candidate and political committees regulated by the MCFA.

Ruling Request

Under Michigan law, corporations are prohibited from making contributions to or expenditures directly on behalf of candidate committees from treasury funds. MCL 169.254. Section 55 of the MCFA, however, provides that a “corporation organized on a for profit or nonprofit basis ... may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes.” MCL 169.255. Neither the MCFA or the Michigan Administrative Rules define the terms “establishment,” “administration,” or “solicitation” under Section 55. Rather, through a series of pre-*Citizens United* Interpretive Statements, Department representatives defined those terms to prohibit corporate funds to be used to pay the costs of providing entertainment, gifts and prizes to people who attend fundraisers hosted by the SSF.

The Interpretive Statements also contradict the October 26, 1983 Declaratory Ruling that states that a “corporation may pay for the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, *fundraising and other expenses* incurred in setting up and running a separate segregated fund established by the corporation.” (Emphasis added). The Declaratory Ruling should control over the wrongly-reasoned Interpretive Statements, which cannot be enforced as a rule of law under the Administrative Procedures Act. MCL 169.215(2); MCL 24.263 (“[a] declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case.”); *Clonlara, Inc. v. State Bd. of Educ.*, 442 Mich. 230, 243 (1993)(interpretive statements are not controlling when they exceed the scope of the act or offer an invalid interpretation of the act).

Moreover, in *Michigan Chamber of Commerce v. Land*, the court ruled that *Citizens United* “forbids the State [of Michigan] from denying corporations/unions their constitutional right to give [treasury] funds to [independent political committees]” which in turn will make independent expenditures. *Land*, 725 F.Supp.2d at 696. The *Land* Court, therefore, prohibited the Department from enforcing MCL 168.254 “against any corporations or labor unions pooling their funds (e.g., through a PAC) for the purpose of independent expenditures, i.e., expenditures made by the PAC or other conduit without coordination, direction, control, or suggestion by or from any candidate.” *Id.* at 698. The reasoning of *Citizens United* and *Land* are in direct conflict with the premise relied on by the Department when issuing the Interpretive Statements: “Section 54 of the Act (MCL 169.254), however, maintains the prohibition on direct corporate participation in the election of candidates.” (Schick, Oct. 4, 1984).

Finally, the Interpretive Statements are entirely unreasonable when compared with permissible expenditures of corporate funds to support an SSF under the Federal Election Commission Rules. Specifically, 11 C.F.R. 114.5(b)(2) explicitly permits the costs prohibited by the Interpretive Statements:

A corporation, labor organization, membership organization, cooperative, or corporation without capital stock may, subject to the provisions of 39 U.S.C. 3005 and chapter 61, title 18, United

States Code, utilize a raffle or other fundraising device which involves a prize, so long as State law permits and the prize is not disproportionately valuable. Dances, parties, and other types of entertainment may also be used as fundraising devices. When using raffles or entertainment to raise funds, a reasonable practice to follow is for the separate segregated fund to reimburse the corporation or labor organization for costs which exceed one-third of the money contributed.

Interpreting this provision, the FEC has ruled that a corporation may use its treasury funds to pay all costs associated with fundraising events, such as dinners, luncheons, receptions, dances and concerts. The only limitation on these contributions is that the SSF must reimburse the sponsoring corporation the costs of prizes or entertainment, but not food and drinks, that exceed one-third of the amount raised in contributions. See AOs 2003-33, 1999-31, 1995-17, 1989-18 and 1981-7. Federal regulations and interpretations of federal statutes that are parallel to Michigan statutes are generally highly persuasive. *Sharp v. City of Lansing*, 464 Mich. 792, 819; 629 N.W.2d 873 (2001).

Questions Presented

- 1) Whether the MCFA may regulate the use of corporate treasury funds to reimburse or defray the costs of fundraising activities in support of an SSF.
- 2) Whether corporate treasury funds may be used to pay for food, drinks or entertainment for events used to in fundraising activities in support of an SSF.
- 3) Whether corporate treasury funds may be used to pay for the cost of meals or other leisure activities that are hosted by corporate board members, shareholders, officers, directors, or managers and awarded to individuals who reach certain contribution levels to a SSF.

Based on the above, we request a declaratory ruling as to whether a corporation may use treasury funds to support fundraising activities including, but not limited to dances, parties, and other types of entertainment, the purchase of prizes or gifts, and the purchase of food, drink, and other necessary goods and services required to host a fundraising event.

To the extent that the Department declines to issue a declaratory ruling as to the above-referenced facts and questions, please issue an interpretive statement, in accordance with MCL 169.215(2).

Thank you for your consideration of our request. If you have any questions or require any additional information, please contact me at the number above.

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

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October 23, 2015

Sincerely,

Miller, Canfield, Paddock and Stone, P.L.C.

By: Michael J. Hodge
Michael J. Hodge

MJH/ksy

Cc: Melissa Malerman (by email at malermann@michigan.gov)

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